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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 609

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,
Petitioners,

v.

J. DONALD DUNCAN as Trustee, *et al.*,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, MOTION FOR LEAVE TO FILE AND SUPPORTING BRIEF

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October 11, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation, *Petitioners,* v. J. DONALD DUNCAN as Trustee, *et al.*, *Respondents.*	No.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now comes Herbert J. Jacobi, counsel for the Petitioners above named, and respectfully moves this Court, to the extent that the accompanying petition seeks relief pursuant to Section 262 of the Judicial Code (28 U. S. C. § 377), for leave to file the petition for certiorari, hereto annexed, under said Section 262, directed to the United States Circuit Court of Appeals for the Second Circuit, to review an order of that Court, entered July 18, 1946, more particularly described in the petition, and for such other and further relief as may be just and proper.

HERBERT J. JACOBI,
Counsel for Petitioners,
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New York 4, N. Y.

October 11, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation, Petitioners, *v.* J. DONALD DUNCAN as Trustee, *et al.*, Respondents.	No.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Charles A. Dana, Sir James Dunn, John W. Hubbard, and Newcombe C. Baker, acting as a Common Stockholders' Committee, Equitable Office Building Corporation, respectfully pray that writs of certiorari issue (1) under Section 240(a) of the Judicial Code to review the order of the United States District Court for the Southern District of New York entered on July 16, 1946, denying petitioners' application for an order to show cause why the instant proceedings under Chapter X of the Bankruptcy Act (52 Stat. 883; 11 U. S. C. §§ 501-676) should not be dismissed upon the payment by the Debtor of its matured debts, and why consummation of the Trustee's Plan of

Reorganization of the Debtor should not meanwhile be stayed, an appeal from which order is now pending in the United States Circuit Court of Appeals for the Second Circuit and (2) under Section 240(a) and, in the alternative, Section 262 of the Judicial Code to review the order of the United States Circuit Court of Appeals for the Second Circuit, entered on July 18, 1946, denying petitioners' application for a stay of consummation of said Plan pending the determination of petitioners' appeal from said order of the District Court.

A certified copy of the pertinent portions of the record in the instant proceedings, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, paragraph 1, of the Rules of this Court.

Opinions

Neither the District Court nor the Circuit Court of Appeals rendered an opinion.

In granting a stay herein, Mr. Justice Reed rendered an opinion which is printed at pages 362-369 of the record.

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. § 347(a)) and, in the alternative, under Section 262 of the Judicial Code (36 Stat. 1162; 28 U. S. C. § 377).

Summary Statement of the Case

The matter herein involved arises in proceedings under Chapter X of the Bankruptcy Act.

The Debtor in said proceedings is a New York corporation which owns and operates the Equitable Building, a

large office building located at No. 120 Broadway and covering an entire block in the downtown New York City financial district (R. 283).*

The Debtor's funded debt and capital stock consists of the following (as at April 30, 1946) (R. 327-328, 330):

Funded Debt:		
First Mortgage		$15,880,543.35
6% Gold Mortgage Bonds, due May 1, 1943	$ 3,000.00	
Accrued and unpaid interest thereon through May 1, 1946	990.00	3,990.00
Thirty-five year 5% Sinking Fund Debentures due May 1, 1952	$4,754,000.00	
Accrued and unpaid interest thereon through May 1, 1946	1,069,650.00	5,823,650.00
		$21,708,183.35
Capital Stock:		
Authorized, issued and outstanding		862,098 shares

All defaults in respect of the First Mortgage have heretofore been cured (R. 327-330).

On April 10, 1941, the Debtor, being unable to pay its debts as they matured, although not insolvent, filed a voluntary petition for reorganization in the District Court for the Southern District of New York. J. Donald Duncan was thereupon appointed as Trustee herein and Henry E. Miller was appointed as additional Trustee (R. 1).

On December 4, 1945, a plan of reorganization (hereinafter called the Trustee's Plan) was approved by the District Court (R. 175) and, on May 13, 1946, said Plan was confirmed (R. 261). The time to appeal from the approval

* References herein to the record are to page numbers.

and confirmation of the Trustee's Plan had expired and orders directing consummation of said Plan had been entered (R. 370, 268, 273), but said Plan had not been consummated, at the time of the filing with the District Court of petitioners' application herein, and consummation of said Plan is now stayed by order of Mr. Justice Reed, pending this Court's action on the instant petition (R. 360).

The Trustee's Plan (R. 181) was predicated upon a finding by the District Court as set forth in the order dated December 4, 1945 approving said Plan (R. 175) that the fair value and then present worth of the land and building at 120 Broadway, New York, was $21,375,000, and the fair value and then present worth of all other assets net to the Debtor was $1,205,761.17, making a total of $22,580,761.17 (R. 177). It provided, among other things, that (a) the First Mortgage of approximately $16,000,000 should remain undisturbed, (b) the $3,000 principal amount of Second Mortgage Bonds (but not the $990 of accrued interest thereon) should be paid in cash, (c) the $4,754,000 principal amount (plus approximately $1,000,000 of accumulated interest) of Debentures should be exchanged for $2,852,400 principal amount of new income bonds (convertible into 456,384 shares of new capital stock) and 475,400 shares of new capital stock, and (d) the presently outstanding 862,098 shares of capital stock of the Debtor should be exchanged for 86,209.8 shares of new capital stock.

On July 16, 1946, prior to consummation of the Trustee's Plan by a transfer of the Debtor's properties and other assets to a newly formed Maryland corporation and the issuance of $2,852,400 of convertible income bonds and 561,609.8 shares of capital stock of such corporation, petitioners obtained *a proposal which, for the first time since the inception of the reorganization proceedings, afforded the Debtor an opportunity to pay off its matured debts in full and regain control of its property.* City Investing Company, a financially responsible New York City realty firm, made an offer, backed by a tender of certified checks for

$517,258.80, (a) to underwrite an offering by the Debtor *pro rata* to its existing stockholders of 862,098 shares of additional capital stock at $6 per share (or an aggregate of $5,172,588), after reducing its presently outstanding capital stock from 862,098 shares to 86,209.8 shares, and (b) if the District Court should so desire, pending the completion of the new stock issue, to purchase for cash up to $5,200,000 of short-term Trustee's certificates on mutually acceptable terms to be agreed upon.

It was apparent to petitioners that this offer, if accepted, and the new financing provided for therein, if carried through, would provide the Debtor with sufficient funds, together with its other available funds, to enable it (i) to pay off in full the principal and the accrued interest on the Second Mortgage Bonds and Debentures (R. 104), thus leaving the First Mortgage as the only outstanding funded indebtedness, (ii) to pay all reorganization expenses, and (iii) to provide adequate working capital for the conduct of its future business. This would substantially improve the position of the stockholders over what their position would be if the Trustee's Plan were consummated, and would result in the Debtor's having a substantially stronger financial structure, by eliminating all debt except the First Mortgage.

Under the Trustee's Plan, the existing stockholders would have retained, in a corporation burdened with complicated restrictions of the plan as to management, voting and dividends (R. 188-189, 194-206), only 15.3% of the equity (above the First Mortgage and new convertible bonds aggregating $18,732,400 principal amount) or, in the event of conversion of the new bonds, only 8.4% thereof (above the Mortgage of $15,880,543). Under the new offer, however, these stockholders would become entitled, if choosing to subscribe for new shares, to the entire equity except for the underwriting interest. If not choosing to subscribe, they would at the least receive the 8.4% of the equity, above the Mortgage, accorded them under the Trustee's Plan and in

addition might well realize through the sale of rights up to $50 for each share owned by them. Mr. Justice Reed alluded to some of these advantages in his opinion of August 6, 1946 (R. 368).

Because of these obvious benefits to the stockholders, petitioners forthwith, on July 16, 1946, applied to the District Court for an order to show cause why the reorganization proceedings should not be dismissed upon the completion of the proposed financing and the payment of all debts (except the First Mortgage) of the Debtor and why a stay of consummation of the Trustee's Plan should not be granted pending the determination of petitioners' application (R. 100, 103).

The aforesaid application was denied on the same day, without hearing and without opinion* (R. 101, 116), the District Court obviously having acted in the belief (contended by petitioners to have been an erroneous belief) that as a matter of law it was without power to entertain petitioners' application after the Trustee's Plan had once been approved and confirmed and the time to appeal therefrom had run, even though the Plan had not yet been consummated (R. 138).

On the following day (July 17, 1946) an appeal was duly taken by petitioners to the Circuit Court of Appeals for the Second Circuit (R. 170) and an application was made to that court** for a stay of consummation of the Trustee's Plan pending the determination of the appeal (R. 382). This application for a stay was denied without opinion on July 18, 1946. Also on July 17, 1946, petitioners duly appealed to the Circuit Court of Appeals from the order of the District Court directing consummation of the Trustee's Plan (R. 171).

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* The opinion of Judge Knox (R. 99) related to the earlier denial of a petition by two stockholders seeking amendment of the Plan rather than dismissal of the proceedings.

** That court consisted of Circuit Judge Learned Hand, together with District Judges Coxe and Goddard. The denial was by endorsement of Judges Coxe and Goddard only. (R. 392)

On August 2, 1946, petitioners, the Debtor, and two individual stockholders severally applied to Mr. Justice Reed for a stay of consummation of the Trustee's Plan pending the filing with this Court of applications for certiorari and action thereon (R. 362), and on August 6, 1946, Mr. Justice Reed granted such a stay (R. 360).

There has been no hearing or determination with respect to this matter in the Circuit Court of Appeals, other than in connection with petitioners' application to that Court for a stay, which, as stated above, was denied.

Questions Presented

(1) In proceedings under Chapter X of the Bankruptcy Act, is the right of a Debtor to pay off its creditors and redeem its properties cut off by the approval and confirmation by a District Court of a plan of reorganization, once the time to appeal therefrom has expired, or does such right of redemption survive until the plan has been consummated?

(2) In proceedings under Chapter X of the Bankruptcy Act, does a District Court have power to entertain an application for a dismissal of the proceedings upon the payment by the Debtor of its matured debts, after a plan of reorganization has been approved and confirmed by such District Court and the time to appeal therefrom has expired, but before such plan has been consummated?

(3) In procedings under Chapter X of the Bankruptcy Act, may a District Court refuse to entertain an application, made before consummation of the reorganization, to dismiss the proceedings upon the payment by the Debtor of its matured debts?

(4) Was there reversible error on the part of the United States District Court for the Southern District of New York in denying petitioners' application for an order

to show cause why the proceedings should not be dismissed upon the payment by the Debtor of its matured debts, and in thus denying petitioners a hearing upon the merits of their application?

(5) Was there reversible error on the part of the United States Circuit Court of Appeals for the Second Circuit in denying petitioners' application for a stay of consummation of the Trustee's Plan of Reorganization pending a determination of petitioners' appeal from the denial by the United States District Court for the Southern District of New York of their application for an order to show cause why the proceedings should not be dismissed upon the payment by the Debtor of its matured debts?

Reasons for Granting the Writs

A. As to the District Court Order of July 16, 1946.

1. This case presents questions of unusual importance in the interpretation and administration of Chapter X of the Bankruptcy Act which have not been, but should be, decided by this Court. Practical considerations depending upon such a decision include: Do stockholders or creditors, after confirmation but before consummation, have the risk of profit or loss and consequently the right to benefit from increases in value, increases which are especially prevalent today and appear in many properties in reorganization? Should precedence be given to an owner's equity to redeem his property or, on the other hand, to the welfare of new investors calculating prospective profits on the basis of a plan which has been confirmed but not consummated? An early authoritative decision of these questions by this Court is of pressing importance, not only to the parties to this proceeding and to the hundred of holders of securities of the Debtor, but also to the numerous other debtors which are presently in proceedings under Chapter X, to the holders of their securities, to the United States District Courts

in the supervision of such proceedings and the administration of the Bankruptcy Act, and to the Securities and Exchange Commission in the conduct of the functions with which it is charged under Chapter X of said Act.

2. The implications to be derived from cases in the Circuit Court of Appeals which touch upon the questions presented are confused and uncertain. *Country Life Apartments* v. *Buckley,* 145 F. (2d) 935 (C. C. A. 2d, 1944), *In re 1934 Realty Corporation,* 150 F. (2d) 477 (C. C. A. 2d, 1945).

3. The effect of unanticipated changes of economic conditions prior to consummation, such as the offer of City Investing Company which was not before the Court when the Plan was confirmed, has not been finally determined by this Court. *R. F. C.* v. *Denver R. G. W. R. Co.,* U. S. , 90 L. Ed. 1134, 1148 (1946), *Ecker* v. *W. P. R. Co.,* 318 U. S. 448, 505-509 (1943).

4. The decision of the District Court in denying petitioners' application without a hearing was clearly erroneous and not in accord with the principles enunciated by this Court when analogous situations have been presented. *Milwaukie and Minnesota Railroad Company* v. *Soutter,* 69 U. S. (2 Wall.) 510, 521-2, (1864); *Wright* v. *Union Central Life Insurance Co.,* 311 U. S. 273, 280-1, (1940); *Wayne United Gas Co.* v. *Owens-Illinois Glass Co., et al.,* 300 U. S. 131, 136-7, (1937).

For the foregoing reasons, the issue of certiorari before the decision of the United States Circuit Court of Appeals for the Second Circuit is clearly in order.

B. As to the Circuit Court Order of July 18, 1946

The decision of the Circuit Court of Appeals in denying petitioners' application for a stay of consummation of the Trustee's Plan pending a determination of the appeal to that Court should be reviewed for the further reason that, under the circumstances existing in this case, such decision was

so clearly erroneous as to require immediate correction in order that the integrity of the judicial process of review may remain unimpaired and the rights of numerous persons may not be jeopardized. Incalculable and irreparable harm and havoc would be caused to the Debtor, to the present holders of securities of the Debtor, to prospective investors, and to the public generally, if the Trustee's Plan were to be consummated, the properties of the Debtor were to be transferred to a new corporation, outstanding debentures and stock of the Debtor were to be exchanged for convertible bonds and stock of a new corporation, new bonds were to be converted into new stock, and new bonds and stock were to be freely and widely traded in on the public stock exchanges and over-the-counter markets, and thereafter petitioners were to be sustained on their appeals and an unscrambling of all these transactions were to be required in order to restore the *status quo ante*. Under these circumstances, it is not too strong a statement that the failure to issue a stay amounts to the countenancing of a misuse of the judicial process under the Bankruptcy Act by permitting the issuance and public distribution of deceptive securities. On the other side of the argument, there has been no showing as to any harm which might be caused to the appellees or to anyone else by a stay of consummation of the Plan until the issues which have been raised on the instant appeals may be disposed of. All of the equities, therefore, weigh overwhelmingly in favor of such a stay—to the point where the failure of the Circuit Court of Appeals to grant the stay was a clear abuse of discretion.

Conclusion

The District Court has erroneously interpreted the Bankruptcy Act upon a point of great importance in its current administration and upon which this Court has not made, but should make, a prompt authoritative decision. The want of a stay pending the determination of appeals would permit an intolerable situation to be countenanced by the processes of the Federal courts. For these reasons certiorari should be granted.

Respectfully submitted,

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October 11, 1946.

BRIEF IN SUPPORT OF THE PETITION

POINT I

The case involves an important question in the construction of the Bankruptcy Act which has not been but should be decided by this Court.

As is dramatically illustrated by the facts in the instant case, very important property rights in reorganization proceedings, running into hundreds of thousands and, perhaps, millions of dollars, depend upon precisely when new interests vest or old interests are cut off during the process of effecting a reorganization. This court has not ruled upon that question, under the present Act.

The urgent need for guidance from this court on this point is illustrated by two apparently inconsistent decisions by the Circuit Court of Appeals for the Second Circuit: *Country Life Apartments* v. *Buckley,* 145 F. (2d) 935 (1944), and *In re 1934 Realty Corporation,* 150 F. (2d) 477 (1945).

In the *Country Life* case, *supra,* proposals to change a plan of reorganization, submitted prior to confirmation, were rejected by the court on the stated ground that "time for offering substitute plans expired with approval of the trustee's plan; and proposals offered thereafter could only be in the nature of a modification of such approved plan", although, in fact, the court had found that the proposals were not fair, feasible or equitable.

In the *1934 Realty* case, *supra,* the same court held that an amendment to a plan should have been allowed after confirmation and after the time to appeal from the order of confirmation had expired. In a petition for certiorari from that decision it was urged (p. 10) that the Court had erred

> "in holding that after adjudication of petitioner's status and the confirmation of a plan, where con-

summation required only the preparation, execution and delivery of formal documents specified in the plan, and neither the adjudication, nor the order of confirmation can be appealed from, amendments may be approved which adversely affect petitioner's status, over petitioner's objections."

The petition was denied (326 U. S. 734 (1945)).

POINT II

The decisions of this Court in analogous situations appear to be at variance with the decision of the District Court from which petitioners have appealed in this case and, in any event, that decision is contrary to the provisions of the Act and violates the basic principles for protecting the equity of redemption.

Although your petitioners' application was denied without opinion by the District Court, that court stated from the Bench "I simply denied the application * * * there manifestly could not be a determination on the merits" (R. 116) and in remarking on the denial of a similar petition of the Debtor, it was "a question of time" and the order of confirmation was "in effect" a sale cutting off the "right to redeem" (R. 138).

1. The Act itself shows that it is upon *consummation* of a reorganization rather than *confirmation* that debts are discharged and the interests of stockholders terminated.

Sections 221-226 and 236 of Chapter X of the Bankruptcy Act (52 Stat. 897-899; 11 U.S.C.A. §§ 621-628, 636), are set forth in the appendix hereto.

Section 221 provides that the judge shall confirm a plan if satisfied that certain conditions have been met.

The pertinent portions of Section 222 provide:

"A plan may be altered or modified, with the approval of the judge * * * before *or after its confirma-*

tion * * *. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. * * *" [Emphasis supplied.]

Thus the tentative character of an order of confirmation is explicitly embodied in the Statute.

Section 223 provides that persons who have previously accepted a plan shall be deemed bound by modifications if failing to reject the changes.

The significant provisions of Section 224 are that:

"Upon confirmation of a plan—

"(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or are allowed or are allowable; * * *."

That Section, although seemingly giving finality to any confirmed plan, must be construed in connection with Section 222, *supra,* which permits changes after confirmation, even if adversely affecting the interests of creditors or stockholders, and with Sections 226, 228 and 236, discussed *infra.* It must therefore be regarded as referring to the binding effect of a plan as finally amended and consummated. To do otherwise would make the Sections of the Act inconsistent with each other, an intention it is not reasonable to attribute to the framers of the legislation.

Section 225 deals with certain liquidated claims.

Section 226 provides in part:

"The property dealt with by the plan, *when transferred* by the trustee to the * * * corporation pro-

> vided for by the plan, * * * shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, * * *." [Emphasis supplied.]

Here again it is emphatically shown that the consummation of a plan by "transfer" of property constitutes the effective moment when claims are cut off and rights are vested.

Section 227 authorizes the court to direct certain action necessary for the consummation of a plan. Finally, Section 228 provides:

> "*Upon the consummation* of the plan, the judge shall enter a final decree—*
>
> "(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;
>
> "(2) discharging the trustee, if any;
>
> "(3) making such provisions by way of injunction or otherwise as may be equitable; and
>
> "(4) closing the estate." [Emphasis supplied.]

The order contemplated by the foregoing Section of the Statute quite evidently is that which was intended by the legislature to cut off the equity of redemption. Should Section 224, *supra*, give that foreclosing effect to a mere order of confirmation, the provisions of Section 222, *supra*, for subsequent amendment, even though adversely affecting the interests of creditors, and stockholders as well as the provisions of Sections 226 and 228, for terminating the interests of the debtor and its stockholders, would be surplusage and could have no effective place in the statutory scheme.

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* The order of July 8, 1946, "order of consummation" (R. 273) certainly is not such an order as is authorized by the quoted section of the Act. It is, of course, merely an order in aid of a consummation which has not yet been brought about.

The provisions of Section 236 throw further light on this question of interpretation. That Section provides, in part, that:

> "If • • • a confirmed plan is not consummated, the judge shall—
>
> • • • • • •
>
> "(2) where the petition was filed under section 128 of this Act, [as was the case in the instant proceeding (R. 1)] after hearing upon notice • • • an order either adjudging the debtor a bankrupt • • • or *dismissing* the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders." [Emphasis supplied.]

This Section, in explicitly contemplating the possibility of dismissing a proceeding after a plan has been confirmed but before it has been consummated, gives further emphasis to the clear intent of the Statute and the error in holding that an order of confirmation in and of itself is a sufficient ground upon which to deny an application for dismissal of a reorganization proceeding.

2. Analogous authorities show that the statute was not intended to give finality to an order of confirmation.

In construing a similar provision of the predecessor statute (§ 77B of the Bankruptcy Act, 48 Stat. 912, 11 U. S. C. § 207) the court expressly stated that an order confirming a plan of reorganization does not operate as a discharge of the debtor from its debts but that "confirmation of a plan of reorganization is but a step in the administration of the debtor's estate • • • " (*Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, 166 (1936)). See also *Wright* v. *City National Bank & Trust Co.*, 104 F. (2d) 285, 287 (C. C. A. 6th, 1939); *In re Deep Rock Oil Corporation*, 113 F. (2d) 266 (C. C. A. 10th, 1940); Finletter, *The Law of Bankruptcy Reorganization*, pp. 662-664; Gerdes, *Corporate Reorganizations* (1936), Section 1153.

3. Analogous decisions of this court afford the utmost protection to the right of redemption.

In *Milwaukie and Minnesota Railroad Company* v. *Soutter,* 69 U. S. (2 Wall.) 510 (1864) a bill was brought to foreclose the mortgage on the property of the railroad. After the amount of the debt had been passed upon by this court, the railroad offered to pay the full amount due, and the court below refused the proposal. In reversing the order of the lower court, this court said (pp. 521-522):

> "• • • The complainants are seeking a foreclosure of a mortgage with a view to make their debt. The owner of the equity of redemption in the mortgaged premises comes forward and offers to pay this debt, or all of it that is due, provided his property, which is in the custody of the court, shall then be restored to his possession. The right of the owner to this order is, under ordinary circumstances, very clear, and a refusal by the court to give him this right would seem to call for the revisory power of this court, when the whole case is before it, on the record brought here by appeal from a final decree.
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> • • • • • •
>
> "• • • While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment or the discharge of a receiver for the mortgaged property, very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court. It is a right which the party can claim; and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. *A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it.* That the order asked for by appellants should have been granted, seems to us very clear." [Emphasis supplied.]

In *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273 (1940) this court held that under Section 75(s)(3) of the Bankruptcy Act (49 Stat. 943, 11 U. S. C. § 203(s)(3)) a farmer's right to redeem his property existed despite the earlier application of a secured creditor for public sale, and although the statute was ambiguous on the question. This court stated (pp. 280-281) that the "important remedial right" of redemption could not be cut off prior to actual disposal of the property save by express legislative enactment.

POINT III

Failure of the Circuit Court of Appeals to grant a stay of consummation, pending review, should be corrected by this Court as an obvious abuse of discretion.

But for the stay granted by Mr. Justice Reed (R. 360) it is abundantly clear that the reorganization of the Debtor would by now have been consummated (R. 118-121) notwithstanding the pendency of appeals which, if successful, might have necessitated disentangling the situation thus created so as to restore the *status quo ante*.

The debenture holders have urged before the District Court that if the plan should be consummated, further rights of the Debtor and its stockholders would be cut off, regardless of the outcome of the pending appeals. If the contentions of the debenture holders are correct, the necessity of a stay to protect the Debtor's equity of redemption and the petitioners' rights to have their appeals heard, is obvious.

If, however, as petitioners contend, consummation of the plan would not cut off the rights of the Debtor and its stockholders but would be subject to rescission, a stay is nevertheless imperative. Should the plan be consummated, $2,850,000 face amount of convertible income bonds and 561,610 shares of common stock in a new corporation would forthwith be publicly distributed to the holders of the outstanding debentures and common stock of the Debtor. Since the common

stock presently outstanding is listed on the New York Stock Exchange and such stock and the debentures are the subject of active trading, the new securities would, no doubt, be immediately widely distributed throughout this country, in Canada and in England, and would continue no change hands rapidly. Innocent purchasers would trade in such securities without actual knowledge of the possibility of a rescission. Securities ought not to be publicly distributed when there is a known possibility that they may be subject to rescission. The processes of the federal courts should not be used for the purpose of creating such a deceptive situation.

The power of this court to review and correct the failure of the Circuit Court of Appeals to grant a stay, is clearly established. *Landis* v. *North American Co.*, 299 U. S. 248 (1936); *Porter* v. *Dicken*, U. S. 90 L. Ed. 959 (1946).

In *Landis* v. *North American Co., supra*, this court granted certiorari to the United States Court of Appeals for the District of Columbia to review a decision on special appeal which reversed orders of the District Court for the District of Columbia granting a stay of proceedings in two cases involving the constitutionality of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79). In reversing the decree of the Court of Appeals and remanding the case to the District Court this court stated, through Mr. Justice Cardozo (p. 254):

> "* * * At the very least there was a likelihood, and indeed almost a certainty, of confusion and embarrassment. In such circumstances the call is plain for a decision that will mark with greater clearness the bounds of power and discretion. We granted certiorari that this result might be attained."

In *Porter* v. *Dicken, supra*, certiorari was directed to the Circuit Court of Appeals for the Sixth Circuit to review its refusal to issue an order prohibiting the eviction of the tenant, pursuant to the Emergency Price Control Act, under the processes of a State court. Concerning the granting of

certiorari this court said, through Mr. Justice Black (pp. 960-961):

> "* * * The Administrator made this application in the Circuit Court of Appeals, but it was denied, thus removing all obstacles to eviction of the tenant. The Circuit Court of Appeals has not heard this case. In order to prevent eviction of the tenant the Administrator sought and obtained from Mr. Justice Reed an injunction pending final disposition of this case in this Court and applied for certiorari directly to this Court under § 240(a) of the Judicial Code, 28 USCA § 347(a), 8 FCA title 28, § 347(a) which authorizes us to grant certiorari 'either before or after a judgment or decree by such lower court.' We were prompted to bring the District Court's judgment directly to this Court for review by reason of the close relationship of the important question raised to the question presented in Porter *v.* Lee, Nos. 1116, 1117, decided this day [—— US ——, ante, 956, 60 S Ct ——]."

Accordingly, even if this court should not wish to consider the important substantive issues involved prior to a determination thereof by the Circuit Court of Appeals, it should grant certiorari in respect to the denial by that court of a stay and, without setting the case for argument, direct that court to issue a stay, pending its determination of the pending appeals. See *Ex Parte United States,* 319 U. S. 730 (1942).

It is respectfully submitted that the writs should be allowed.

HERMAN E. RIDDELL,

HERBERT J. JACOBI,

Counsel for Petitioners.

October 11, 1946.

APPENDIX

Sections of Chapter X of the Bankruptcy Act

Article XI—Confirmation and Consummation of Plan

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such officers, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or

modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SEC. 224. Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

SEC. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

SEC. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 227. The court may direct the debtor, its trustee any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

* * * *

SEC. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 609

CHARLES A, DANA, SIR JAMES DUNN, JOHN W. HUBBARD, and NEWCOMBE C. BAKER, as a Common Stockholders' Committee, Equitable Office Building Corporation,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

No. 610

EQUITABLE OFFICE BUILDING 1913 CO., INC.,

Petitioner,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS

HERMAN E. RIDDELL
HERBERT J. JACOBI
Counsel for Petitioners in No. 609

CHARLES GREEN SMITH
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November 14, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders' Committee, Equitable Office Building Corporation, *Petitioners,* *v.* J. DONALD DUNCAN, as Trustee, *et al.*, *Respondents.*	**No. 609**
EQUITABLE OFFICE BUILDING 1913 CO., INC., *Petitioner,* *v.* J. DONALD DUNCAN, as Trustee, *et al.*, *Respondents.*	**No. 610**

REPLY BRIEF OF PETITIONERS

Most of the arguments of respondents in opposition to the petitions show not that the petitions should be denied, but, on the contrary, that there *are* important and undecided questions in these cases which warrant the granting of certiorari, and Petitioners' affirmative arguments to this effect have already been stated. We wish to reply briefly, however, to respondents' contention that the cases are moot (Brief of Debenture Holders, p. 27; Supplemental Brief of

Debenture Holders Committee, p. 2), because the time within which the underwriting offer of City Investing Company might have been accepted has expired.

City Investing Company's offer, when made, contained a reasonable time (90 days) for its acceptance and was outstanding when these petitions were filed. It would be highly unreasonable to expect that the unilateral commitment for over $5,000,000 contained in that offer should be kept open during the indefinite period required for the conclusion of the instant litigation. On the other hand, it is not at all unreasonable to expect that if the pending appeals are successful a new underwriting proposal will be made—and negotiations with City Investing Company which are currently in progress give a strong indication that such expectation will be realized.

It has been primarily the action of the respondents herein, the Debenture holders, in opposing acceptance of City Investing Company's underwriting offer and the contemplated payment in cash of their debts which has brought about the expiration of that offer before it could be accepted or even entertained on its merits. Under these circumstances, the rule stated in *Mills* v. *Green*, 159 U. S. 651, 653 (1895) that where events have transpired "without any fault" of the respondent which make it impossible to grant "any effective relief whatever" the Court will dismiss a pending appeal, is not applicable.

In the instant case a determination of the pending appeals in favor of Petitioners will grant to them "effective relief"—namely, the opportunity to be heard before the district court upon the merits of their proposals for paying off creditors, preserving the equity of stockholders, and dismissing the bankruptcy proceedings. As heretofore stated, Petitioners have reasonable cause to believe that if and when that opportunity is afforded to them they will be able, as they were in July, to submit to the district court a meritorious underwriting offer. If, contrarywise, the

pending appeals should be dismissed without a determination of the substantive questions which are involved, solely because the particular underwriting offer which Petitioners unsuccessfully attempted to present to the district court has expired, as a practical matter Petitioners will never be given the opportunity to have their "day in court". Obviously, no prudent business or banking firm is going to make a substantial underwriting offer of unlimited duration and, as a consequence, any effort by Petitioners to have a meritorious underwriting proposal considered in this case will be unsuccessful so long as the district court abides by its present convictions as to the law, thus forcing Petitioners into the appellate courts, and the appellate courts then dismiss the matter as moot as soon as the underwriting commitment expires. Consequently, the fact that City Investing Company's offer has expired should not foreclose Petitioners' right to have the questions which have been raised as to the district court's authority in the premises finally determined upon the instant appeals. See *United States* v. *Freight Association*, 166 U. S. 290, 308-309 (1896); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 515 (1910).*

With respect to this point, we call attention to that portion of the opinion of Mr. Justice Reed in the instant case (R. 368-369) wherein he said:

> "I do not think that the present debenture holders' objection to the early termination of the

---

* Upon argument of the appeal of the stockholders Knight and Doyle (petitioners in No. 612 in this Court) before the Circuit Court of Appeals for the Second Circuit on November 11, 1946, a motion was made by counsel for the Debenture Holders Protective Committee to dismiss all three appeals in that Court (including the appeals therein of Petitioners) as academic and moot, on the ground that the offer of City Investing Company had expired. That motion was summarily and unanimously denied from the bench, Judges L. Hand, A. Hand and Chase participating.

> underwriting proposal is sound. It is the debenture holders' objection to accepting payment of their debts in full that delays prompt cash payment through the issue of trustee's certificates."

Strong evidence that there is still a real controversy here is that respondents are urging, as an alternative to their contention that the cases are moot, that they are entitled as of right to values which they obviously believe to be in excess of the principal amount of their debentures and the accrued interest thereon.

Conclusion

It is respectfully submitted that certiorari should be granted.

HERMAN E. RIDDELL
HERBERT J. JACOBI
Counsel for Petitioners in No. 609.

CHARLES GREEN SMITH
Counsel for Petitioner in No. 610.

November 14, 1946.

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Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 609, 610 and 612

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation, *Petitioners*, v. J. DONALD DUNCAN, as Trustee, et. al., *Respondents.*	No. 609
In the Matter of EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co., Inc."), *Debtor*, EQUITABLE OFFICE BUILDING 1913 CO., INC., *Petitioner*, J. DONALD DUNCAN, as Trustee, et. al., *Respondents.*	No. 610
ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of the Equitable Office Building Corporation, Debtor, *Petitioners*, v. J. DONALD DUNCAN, as Trustee, et. al., *Respondents.*	No. 612

BRIEF OF DEBENTURE HOLDERS IN OPPOSITION TO PETITIONS FOR CERTIORARI.

This brief is filed on behalf of holders of the debtor's 35 Year 5% Sinking Fund Debentures in opposition to the petitions for certiorari filed

(a) by Charles A. Dana, et al., as a Common Stockholders' Committee (No. 609);

(b) by the debtor, Equitable Office Building Corporation (No. 610); and

(c) by Adelaide H. Knight and William P. Doyle, alleged stockholders (No. 612).

As these cases arise from identical facts and present the same principal questions, respondents, in the interests of expedition, respectfully request permission to file this single answering brief.

Opinions Below

The District Judge filed a memorandum opinion on July 16, 1946 (R. 99) relating specifically to his denial of the petitions by Adelaide H. Knight and William P. Doyle (No. 612), but he indicated in denying the applications of the other petitioners (Nos. 609 and 610) that he was actuated by the same reasoning. (R. 138, 142, 346).

The Circuit Court of Appeals for the Second Circuit filed no written opinion when it denied the applications of petitioners for a stay pending determination of the appeals in that Court.

Jurisdiction

Petitioners in all these applications (Nos. 609, 610 and 612) apply for writs of certiorari, under Section 240(a) (28 U.S.C. §347) and alternatively under Section 262 (28 U.S.C. §377) of the Judicial Code, to review orders of the United States Circuit Court of Appeals for the Second Circuit denying applications for a stay of consummation

of a confirmed plan in this proceeding under Chapter X of the Bankruptcy Act, pending a determination of the merits of appeals to said Circuit Court.

Petitioners in No. 609 also apply for a writ of certiorari to review, under Section 240(a), an order of the United States *District Court* denying their application for an *order to show cause* why the proceedings should not be dismissed, which order is now on appeal in the United States Circuit Court of Appeals for the Second Circuit.

Petitioner in No. 610 also applies for a writ of certiorari to review, under Section 240(a) of the Judicial Code (28 U.S.C. §347), an order of the United States *District Court* denying debtor's application for an order vacating the order of confirmation of plan and dismissing the proceedings under Chapter X of the Bankruptcy Act, which order is now on appeal in the United States Circuit Court of Appeals for the Second Circuit.

Jurisdictional Question Presented

Respondents respectfully call to this Court's attention that Section 240(a) of the Judicial Code, in so far as it grants to the Supreme Court power "to require by certiorari . . . *before* . . . a judgment or decree" by the Circuit Court of Appeals "that the cause be certified to the Supreme Court for determination", does not apply to proceedings under the Bankruptcy Act.

The jurisdiction of this Court in bankruptcy proceedings is set forth in Section 24 of the Bankruptcy Act, which is entitled "Jurisdiction of Appellate Courts":

> "c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the pro-

> visions of the laws of the United States now in force or such as may hereafter be enacted."

No jurisdiction is granted to review judgments, decrees, and orders of the *District Court*. No jurisdiction is conferred, *prior* to the entry of a judgment, decree or order therein, to cause proceedings pending in the Circuit Court of Appeals to "be certified to the Supreme Court for determination".

No judgment, decree, or order of the Circuit Court of Appeals has been entered on the merits of petitioners' appeals from the orders of the District Court.

Section 24(c) of the Bankruptcy Act, which is expressly made applicable to proceedings under Chapter X by Section 121 of the Bankruptcy Act, was enacted in 1938; the last amendment of Section 240(a) of the Judicial Code was enacted in 1925. It is significant that prior to the enactment of Section 24(c) of the Bankruptcy Act in 1938, the language of the statute conferred broader power upon the Supreme Court. Former Section 24(a) of the Bankruptcy Act read:

> "The Supreme Court of the United States . . . in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

Respondents therefore request this Court to dismiss the applications in Nos. 609 and 610 for writs of certiorari to review orders of the United States District Court.

If this Court should overrule the foregoing contention of Respondents, they respectfully ask the Court in the exercise of its discretion to dismiss or deny the writs upon the other grounds hereinafter set forth.

Questions Presented

A. As to Nos. 609, 610 and 612:

1. Did the Circuit Court of Appeals for the Second Circuit abuse its discretion—after hearing a discussion on the facts and on the effect upon this proceeding if the stay were granted—in denying an injunction to restrain consummation of a confirmed plan when collateral attacks upon it had been overruled by the District Court and appeals from the rulings were pending in said Circuit Court of Appeals? (See Point I, *infra*, p. 9.)

B. As to No. 609:

2. Does an appeal lie from a denial by the District Court of an application for an *order to show cause*? (See Point II, *infra*, p. 10.)

C. As to No. 610:

3. Is a motion for a vacation of an order confirming a plan in the nature of a motion for a rehearing, when the motion is not based on mistake, gross inequity, fraud, or similar grounds, and if there is no allegation that the confirmed plan is not fair and equitable, or feasible? If so, is a denial of such a motion appealable? (See Point III, *infra*, p. 11.)

D. As to Nos. 609 and 610:

4. Where a proceeding under Chapter X of the Bankruptcy Act has been initiated by the filing of a petition under Section 128, may the court dismiss the proceeding without a hearing upon notice to the debtor, stockholders, creditors and other interested parties? (See Point IV, *infra*, p. 12.)

The following question is reached in No. 609 if questions 2 and 4 are answered in the affirmative, and is reached

in No. 610 if questions 3 and 4 are answered in the affirmative:

5. Did the bankruptcy court, in a proceeding under Chapter X, abuse its discretion in refusing to grant motions of stockholders and the debtor to vacate an order confirming a plan, when: the confirmed plan was concededly "fair and equitable" and "feasible"; the confirmed plan was based upon the sound economic value of the debtor's assets; no change in the economic value of the assets had occurred after confirmation of the plan; all interested parties who had appeared in the proceeding had approved confirmation; all classes of creditors and stockholders had overwhelmingly voted in favor of the plan; of those qualified to vote, 84% of the stockholders, 99% of the debenture holders, and 100% of the Gold Mortgage bondholders, had voted in favor of it; the time to appeal from the order of confirmation had expired and no appeal had been taken; there was no claim of mistake, gross inequity, important change in economic conditions, or fraud; and petitioners applied for a vacation of the order of confirmation solely in the hope that through the medium of a new plan they might get some advantage from a temporary, inflated, "when issued", price per share, in July 1946, in a thin and highly speculative "over the counter" market, which was in excess of the sound economic value of such shares, as fixed in the reorganization proceeding?[1] (See Point V, *infra*, p. 12).

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[1] The price of the shares has recently dropped to approximately $7.50 to $8.50 per share. Allowing for the difference in the value of the assets of the debtor under the respective plans, these prices would roughly be equivalent to $6.50 to $7.50 for the shares under the proposed new plan. The sound economic value of the shares is $6. The value at which they are allotted to the old debenture holders under the confirmed plan is $6.50.

Facts

The facts are concisely stated when needed in the argument of this brief.

Statutes Involved

The pertinent provisions of statutes involved in this case are set forth in the Appendix, *infra,* p. 30.

Summary of Argument

In denying the "stay", the Circuit Court of Appeals acted in the reasonable exercise of its discretion after a full hearing on the facts and on the effect which a grant of the stay would have on the pending proceeding. The "stay" requested was in essence an injunction against enforcement of a court order which was being attacked collaterally, and not by direct appeal. Since innumerable collateral attacks may be made on any order, courts are reluctant to suspend proceedings because of such collateral attacks.

Appeal does not lie from refusal to sign an order to show cause.

An application to vacate an order confirming a plan, —when the application is not based on mistake, gross inequity, fraud or similar grounds, or on the ground that the plan is not fair and equitable or not feasible, but merely on the ground that some stockholders may benefit from the substitution of a new plan for one which is concededly fair and equitable and feasible—is in the nature of an application for a rehearing on the order of confirmation. Denial of an application for a rehearing is not appealable.

Notice of a hearing on an application for the dismissal of a proceeding under Chapter X must be given to all creditors and stockholders. Such notice was not given by petitioners.

Petitioners' applications either:

(a) seek a "modification or amendment" of the plan pursuant to Section 222 of the Bankruptcy Act; or

(b) seek a reopening of the proceeding and a rehearing of the order of confirmation.

If regarded as proposed amendments under Section 222, they were properly denied as attempting to substitute a new plan under the guise of an amendment of a plan approved, accepted, confirmed, and partially consummated.

If considered as applications to reopen the proceeding and for a rehearing, they were properly denied because they contain no allegation of fraud, a major change in economic conditions, surprise, or other facts warranting such relief.

But whether considered as an amendment under Section 222, or an application for a rehearing under the general equity powers of the court, they were in either event addressed to the discretion of the court.

There was no abuse of discretion in denying the applications. The confirmed plan is fair and equitable and is based on a valuation of the debtor's assets which is concededly correct. The proposed modified or new plan is without merit, and is not feasible; there is no assurance that it could be put into effect if substituted for the confirmed plan.

The proposal of petitioners involves the substitution of a new plan for the confirmed plan. It does not involve payment by a debtor of its debts.

The action of the District Court in refusing to set aside the confirmed plan has been vindicated by subsequent events. The underwriter originally produced has refused to continue its offer because of a change in market conditions. No other offer of underwriting has been substituted.

The questions herein are either of minor importance, or have been settled by judicial decision, or involve conclusions to be drawn from the peculiar facts of this case. No important question of law will be settled by a review of this case by this Court. There is no conflict among the decisions of the courts.

POINT I

The Circuit Court did not abuse its discretion in denying the injunction.

The "stay" which was requested was in reality an *injunction* to prevent the consummation of a plan approved and confirmed by concededly valid orders consented to by all the parties and not opposed by any, from which orders no appeals had been taken. Final adjudication, upon appeal, that the several collateral attacks now pending have no merit, will not prevent other attacks and other applications for similar injunctions. Endless delay in the consummation of this reorganization, to the detriment of all interested parties, would occur if injunctions against consummation of the plan were issued whenever a non-meritorious application is denied and an appeal is taken.

The courts show much greater reluctance in issuing *injunctions*, which are collateral to appeals, than in issuing *stays* of orders or judgments which are themselves the subject of the appeals. A *stay* may be secured almost as a matter of course through the statutory procedure for *supersedeas*. *Injunction* is an extraordinary remedy granted only under unusual circumstances. *State Corp. Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 568 (1934); *Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U. S. 334, 337-8 (1933); *Hunnewall* v. *Cass County*, 22 Wall. 464, 478 (1875).

The Circuit Court refused the injunction after a hearing at which the parties were given an opportunity to be heard both on the facts and on the effect of an injunction on the pending proceedings. In the absence of a clear showing of an abuse of discretion, its refusal to grant the "stay" should not be reviewed by this Court. *Hovey* v. *McDonald,* 109 U. S. 150, 161 (1883); *In re Lesser,* 99 Fed. 913, 914 (C.C.A. 2d, 1900); 2 Collier on Bankruptcy (14th ed. 1940), pars. 24.39, 24.40.

Writs are requested from denials of "stays" in each of Nos. 609, 610 and 612.

POINT II

An appeal does not lie from a refusal to sign an order to show cause.

In No. 609, the Stockholders' Committee petitions for a writ of certiorari "to review the order of the District Court . . . denying petitioners' application for an *order to show cause"* (emphasis supplied).

An order denying a petition for an order to show cause only denies one means prescribed by law for bringing on a matter for hearing; it is an administrative order and is not appealable. *Morehouse* v. *Pac. Hardware & Steel Co.,* 177 Fed. 337 (C.C.A. 9th, 1910); *cf., Fed. Power Com'n.* v. *Met. Edison Co.,* 304 U. S. 375, 383-4 (1938); see 2 *Collier, Bankruptcy* (14th ed. 1940) Par. 24.39.

Petitioners could have brought their motion on for hearing by a notice of motion.

POINT III

The motion to vacate the order of confirmation was in effect a motion for a rehearing. An order denying a rehearing is not appealable.

While it is clear by the decisions of this Court that the District Court has power to grant motions for rehearings out of term, it is equally clear that neither a refusal to entertain such a motion, nor a denial of such a motion, if entertained, is appealable. *Wayne Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U. S. 131, 137 (1937); *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 149-50 (1942); *Conboy* v. *First Nat. Bank*, 203 U. S. 141, 145 (1906).

The same rule applies to motions to reopen, *Wragg* v. *Fed. Land Bank*, 317 U. S. 325, 327 (1943); motions to modify, *Old Colony Tr. Co.* v. *Kurn*, 138 F. (2d) 394, 395 (C.C.A. 8th, 1943); motions to vacate, *Brown* v. *Thompson*, 150 F. (2d) 171, 172 (C.C.A. 8th, 1945); and all like motions, however denominated.

The motions for a vacation of the order of confirmation were not based upon alleged mistake, gross inequity, fraud, or similar grounds; nor were said motions based on any allegation that the confirmed plan is not fair and equitable or not feasible. A new plan is desired merely because petitioners believe such new plan may afford *some* additional benefits to *some* stockholders.

Such motions are clearly in the nature of motions for a rehearing on confirmation of the plan. As such, denial thereof is not appealable.

POINT IV

The District Court had no power to dismiss the proceeding without a hearing upon notice to all creditors, stockholders, etc.

In No. 609, petitioners apply for a writ to review the order of the District Court denying an order to show cause bringing on for hearing their application for an order dismissing the proceedings under Chapter X (Stockholders' Committee petition, p. 3).

In No. 610, the petitioner applies for a writ to review an order of the District Court denying its application for an order dismissing the proceeding (Debtor's petition, p. 3).

When the Chapter X proceeding was initiated no bankruptcy proceeding was pending. The petition initiating the proceeding was, therefore, filed under Section 128 of the Bankruptcy Act.

The petition having been filed under Section 128, the Court may dismiss the proceeding only after a hearing upon notice to the Debtor, and all stockholders, creditors and other interested parties (Bankruptcy Act, Sec. 236[2]).

The petitioners did not bring on their motions upon such notice.

POINT V

The District Court did not abuse its discretion in denying the applications to vacate its order of confirmation.

A. An order confirming a plan should not be vacated except upon the most compelling grounds:

Under Section 222 of the Bankruptcy Act the District Court may approve "alterations" or "modifications" of a plan In the exercise of this power, however, the Court

should not approve a completely new plan — as petitioners propose in this case. *In Re Diversey Bldg. Corp.*, 141 F. (2d) 65, 69 (C.C.A. 7th, 1944); *Country Life Apts.* v. *Buckley*, 145 F. (2d) 935, 937 (C.C.A. 2d, 1944); *Rogers* v. *Consolidated Rock Products Co.*, 114 F. (2d) 108, 111 (C.C.A. 9th, 1940); *Downtown Inv. Ass'n.* v. *Boston Metropolitan Bldgs.*, 81 F. (2d) 314, 321 (C.C.A. 1st, 1936).

The bankruptcy court, as a court of equity, also has power to revoke or modify its orders confirming or directing consummation of a reorganization plan, but such action will not and should not be taken except in unusual circumstances and upon a showing of compelling grounds such as fraud, mistake in fact, or a wholly unenvisaged change in the value of the Debtor's assets. *R. F. C.* v. *Denver & R. G. W.*, 90 L. ed. 1134, 1148 (1946); Rule 60, *Federal Rules of Civil Procedure*; *Graffam* v. *Burgess*, 117 U. S. 180, 191-2 (1886); *In re Burr Mfg. & Supply Co.*, 217 Fed. 16 (C.C.A 2d, 1914); *In Re Burton Coal Co.*, 57 F. Supp. 361, 364 (N.D. Ill. 1944); *Mohonk Realty Corp.* v. *Wise Shoe Stores*, 111 F. (2d) 287, 289 (C.C.A. 2d, 1940), *cert. denied*, 311 U. S. 654 (1941). No such grounds were alleged by petitioners.

Under the terms of Section 224, the order of confirmation destroys all the former rights of creditors and stockholders and vests in them such new rights as are granted to them under the confirmed plan. Upon confirmation, all questions which could have been raised appertaining thereto become *res judicata*. S. Rep. No. 1916 on H. R. 8046, 75th Cong., 3d Sess. (1938) 36; *Prudence Realization Corp.* v. *Ferris*, 323 U. S. 650, 654-5 (1945); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 375, 378 (1940); *Stoll* v. *Gottlieb*, 305 U. S. 165, 172-7 (1938). The plan is then conclusive, in the absence of the utmost urgency, upon every claimant and stockholder, even though some of them failed to file proofs of claim or interest, or

to appear in the proceeding. *Prudence, Chicot County,* and *Stoll* cases, *supra; North American Car Corp.* v. *Peerless W. & V. Machine Corp.,* 143 F. (2d) 938 (C.C.A. 2d, 1944).

B. An order of confirmation is not merely "a step in the process of the administration of the Debtor's estate" but it vests rights in the creditors and stockholders:

Respondents contend that the order of confirmation vests rights in the creditors and stockholders which can be divested only through a proper application to "alter or modify" a plan under Section 222, or through the exercise by the court of its inherent power as a court of equity to set aside its order because of gross inequity, important change in economic situation, mistake or fraud.

The contention of petitioners is that rights are not vested until there has been a "consummation" of the plan. They give no effect to an order of confirmation.

The contention of the petitioners does not conform to the pattern of the statute. The procedure contemplated by the Act is as follows:

Under Section 224, upon confirmation the plan and its provisions become binding upon the debtor and all creditors and stockholders, whether or not they have filed proofs of claim or interest. The old rights of creditors and stockholders are taken away, and new rights substituted. The section also obligates the debtor and all other persons to comply with the provisions of the plan and all orders which the court may make relative thereto, and directs that distribution "shall be made in accordance with the provisions of the plan to creditors and stockholders".

Section 226 provides that after confirmation of the plan the properties shall be transferred by the trustee to the debtor or to the corporation provided for in the plan, and when transferred shall be free and clear of all claims and interest of the debtor and its creditors and stockholders,

except as otherwise provided in the plan or the order confirming the plan. This section deals with legal title and determines that title to the property of the debtor passes from the trustee to the reorganized debtor or to the new corporation upon its transfer by the trustee.

Section 227 gives the court power to compel the debtor, the trustee, any mortgagees, indenture trustees or other necessary parties to execute and deliver any and all instruments necessary to consummate the confirmed plan.

Section 228 provides that upon full consummation of the plan the judge shall enter a final decree discharging the debtor and the trustee and closing the estate. It is clear that this final decree is in the nature of a decree settling the accounts of the trustee or debtor in possession and granting them a discharge upon a satisfactory showing that they have done everything necessary to consummate the confirmed plan and have satisfactorily accounted for their acts.

If a plan were, as argued by petitioners, to become effective only upon "consummation" of a plan, confusion and chaos would exist during the period between confirmation of the plan and entry of the final decree. Innumerable steps, in series, must be taken in consummation of a plan after entry of the order of confirmation and before the final decree can be entered. There is no instant of time and no particular act which can be pointed to as the precise point at which a plan has been "consummated". Is the plan "consummated" when the first transfer of assets occurs, or when a majority of such assets are transferred, or when all the assets have been transferred? If the answer be that transfer of a majority or all of the assets is necessary, is no effect to be given to the transfer of less than a majority? What about all the other steps which must be taken in consummation? Are *none* effective until *all* have been taken? If effective before completion of *all* the

steps, what particular steps are necessary to constitute consummation?

Orderly procedure clearly demands that the order of confirmation be given effect as vesting rights, that the acts of consummation be considered as performance of the various acts necessary to give legal evidence of the transfer of the rights vested by the order of confirmation, and that the final decree be given effect as evidence of a proper accounting by the debtor and Trustee, as an approval of their accounts, as an order discharging them from further liability, and as an order closing the estate.

Respondents do not contend that rights vested by an order of confirmation may never be disturbed. They concede that there may be a divestment of such rights by "alterations or modifications" of a plan, in a proper case, under Section 222 of the Bankruptcy Act, or where there is a showing of gross inequity, important change in economic situation, mistake or fraud. The facts alleged in the petitions do not bring this case within any of these categories.

C. The proposals of petitioners are not offers of the debtor to pay its debts:

The plan which is sought to be modified was confirmed by order of the court dated May 13, 1946. Under the provisions of Section 224 of the Bankruptcy Act, "upon confirmation of a plan, the plan and its provisions shall be binding . . . upon all creditors and stockholders". Confirmation of the plan, therefore, substituted new vested rights and obligations for those previously represented by the old claims and stock of the debtor. Debenture holders lost their right to receive $5,942,500 (principal and interest to November 1, 1946) in cash. Substituted for it was a right to receive $2,852,400 in new debenture bonds and 475,400 shares of the new common stock. Petitioners now

propose that these new vested rights shall be taken away by a proposed new plan. They do not offer to satisfy these new rights.

In any event, this is not a case of a debtor coming into court with funds for the payment of its debts. What is involved is an intricate proposal to recapitalize the debtor and to offer stock for subscription by stockholders, the unsubscribed stock to be underwritten. The petitioners propose that the reorganization proceeding shall be dismissed only *after* the recapitalization and financing have been effected. Therefore, the proposal involves a new plan of reorganization, and would require a reopening of the proceedings *de novo* and compliance with all of the statutory safeguards afforded by Chapter X with respect to plans, including submission to and approval by the security holders.

Milwaukee & Minnesota R. R. Co. v. *Soutter,* 69 U. S. 510 (1864) is not in point. It merely held that when a foreclosure decree expressly provided that a sale was not to be held until after the expiration of one year, the owner could pay the indebtedness before the expiration of such year.

In *In Re Deep Rock Oil Corp.,* 113 F. (2d) 266, 269 (C.C.A. 10th, 1940), the court held that if the assets of a debtor "*should so increase in value* that there would be a substantial equity" for stockholders, "the Court under its broad equitable powers would have power to prescribe a modification of the plan to make available this equity" to them. The court held the Deep Rock Oil Corporation's assets had not increased. In the instant case, there was neither alleged nor proven any increase in the value of the debtor's property.

Wright v. *Union Central Life Ins. Co.,* 311 U. S. 273 (1940), merely holds that under the express provisions of Section 75(s)(3) of the Bankruptcy Act, a farmer-debtor

is entitled to an opportunity to redeem his property "before sold at public auction".

The brief filed on behalf of the debtor quotes *Gerdes, Corporate Reorganizations,* Section 1153, to the effect that dismissal of a reorganization proceeding "may also be equitable where the debtor has, during the proceeding, become solvent and liquid enough to pay all of its debts as they mature". The context from which this statement was taken makes it clear that it refers to a dismissal prior to the proposal, acceptance, or confirmation of a plan of reorganization, and not after a plan has been accepted and confirmed. See 3 *Gerdes, Corporate Reorganizations,* Section 1135, where the following statement is made: "The climax of any proceeding instituted under Section 77B is the judge's confirmation of the plan of reorganization. Once the plan is confirmed, nothing remains to be done except the ministerial tasks required to execute and consummate the plan physically".

D. The District Court properly denied the applications in the exercise of a sound discretion:

The District Court held that it had power to grant the petitions.[1a] It therefore denied said petitions in the exercise of its discretion.

When the District Court exercised its discretion, it did so with knowledge of the following facts:

(a) The confirmed plan was "fair and equitable" and "feasible";

[1a] At one of the hearings on these petitions, the Court said (R. 66): "Whether it [Section 222 of the Bankruptcy Act] authorizes it or not, I can do it. I have no doubt about it, but the thing I am asking you as trustee is whether you think I should." (Material in brackets has been supplied.)

At another hearing, the Court said (R. 32): "I know I have the power".

(b) The confirmed plan was based on a valuation of the debtor's assets which gave due weight to the abnormally high profits which might reasonably be expected in the near future;[2]

(c) There had been no unanticipated increase in the value of the debtor's assets after their valuation by the Court;[3]

(d) All of the parties who had appeared of record in the proceedings had consented to the confirmed plan or had acquiesced in its confirmation, no appeals had been taken from the order of confirmation, and the time to take appeals had expired (R. 26, 53-4);

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[2] Petitioners do not claim error in the valuation of the debtor's property. Three well qualified real estate experts testified. One, retained by the Trustee, estimated a normal future net income applicable to interest and amortization of $1,322,500, and a building value of approximately $20,000,000; another, called in behalf of the debenture holders, estimated that the normal future net income available for interest and amortization would be $1,295,000, and that the building had a value of approximately $20,000,000; and the third, testifying for the Common Stockholders' Committee, estimated the normal future net income applicable to interest and amortization would be $1,355,000, and appraised the building at approximately $23,500,000 (R. 324). The Court fixed the value of the building at $21,375,000 (R. 177). The only criticism of the Court's valuation was that it was *too high*—too favorable to stockholders. This was the view of the Securities and Exchange Commission (R. 322).

[3] Not only is there no allegation in the petitions of any change in the value of the debtor's property since the orders of approval and confirmation, but no such change has in fact occurred. The estimated income for the fiscal year ending April 30, 1946, used in the valuation of the debtor's property, was $120,000 *greater than the actual net income* subsequently realized for that fiscal year as shown by the auditor's report (R. 324), although the percentage of occupancy of the building during the fiscal year 1946 was the highest since 1938, and was substantially in excess of the estimated average future occupancy percentage used by the experts in determining the value of the property (R. 324).

(e) The debentureholders who had qualified to vote on the plan by filing claims had accepted the confirmed plan by a vote of 99% in favor, 1% opposed, and the stockholders so qualified had accepted the plan by a vote of 85% in favor, 15% opposed (R. 243);

(f) The proposed new plan would jeopardize the debtor's cash reserve for future contingencies;[4]

(g) The proposed new plan would be of doubtful benefit to stockholders who could and would subscribe for additional shares at $6 per share,[5] and would definitely injure stockholders who either could not or would not subscribe for such shares,[6]

(h) The underwriting agreement which is an inherent and necessary part of the proposed new plan would not

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[4] The proposed new plan provides for the retirement of the old debenture bonds by payment in full, principal and accrued interest, in cash. The cash required for this purpose, even if payment could have been made as early as November 1, 1946, would have been $5,942,500. Of this amount, it was proposed to raise $5,172,588 by giving old stockholders a right to subscribe, at $6 per share, for 862,098 shares of the new stock of the debtor; the balance of $769,912 would have been taken from the treasury of the debtor. The District Judge expressed great concern over this proposed use of the debtor's cash (R. 68, 98).

[5] On the basis of the value of the debtor's property fixed by the experts and the Court—which value is not questioned by these appellants—each of the new shares has a value of slightly *less* than $6, the amount which stockholders would be compelled to pay for each of their additional shares.

[6] Stockholders who fail to subscribe for the new shares would receive the same number of shares under both plans; *but* the value of the equity represented by the entire issue of new common stock would be $769,912 *less* under the proposed new plan since this amount of cash would be taken from the coffers of the debtor to make up the difference between the payment to be made to retire the old debentures and the amount which would be receivable on stock subscriptions at $6 per share.

be binding upon the underwriter, although an unconscionable fee would be paid under it to the underwriter;[7]

(i) Even if the underwriter were voluntarily to purchase shares under the terms of the underwriting agreement, the price to be paid by it would be considerably less per share than will be received for such shares, under the confirmed plan, from the debenture holders;[8]

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[7] Under the so-called underwriting agreement the underwriter would not have been required to purchase any of the shares (R. 107, 156, 134) unless, *prior to October 15, 1946*, the proposed new plan had been finally confirmed, it had been carried out by the transfer and conveyance to a new company of all the assets and properties, all rights of appeal from orders confirming or relating to the consummation of the plan had expired, all appeals taken had been finally disposed of, the new stock had been offered to the old stockholders and not subscribed for, and there had been delivered to the underwriter the unsubscribed shares which it would have been required to purchase.

Even with the consent of all the interested parties, there was no possibility of performing these conditions within the time fixed. The underwriter was informed of this by the court, the Commission and the parties, but refused to extend the time. (R. 66, 67.)

The same criticism of impossibility of meeting the conditions applies to the offer of the underwriter to purchase up to $5,200,000 of Trustee's Certificates, which offer specifies that the certificates should become due *October 15, 1946*, (R. 109-110; 134; 158).

For its agreement, although unenforceable, the underwriter was to receive a fee of 69,686 shares of the debtor's stock (R. 107, 134, 155).

The action of the District Court in refusing to set aside the confirmed plan has been vindicated by subsequent events. The underwriter originally produced has refused to continue his offer because of a change in market conditions. No other offer of underwriting has been substituted.

[8] If no stockholder subscribes for additional shares, the underwriter will be entitled to 931,784 shares for a total payment of $5,172,588—$5.55 per share; if stockholders subscribe for 50% of the shares, the underwriter will receive 500,735 shares for $2,586,294—$5.15 per share; if stockholders subscribe for 80% of the shares, the underwriter will receive 242,106 shares for $1,034,518—$4.27 per share; if stockholders subscribe for 90% of the shares, the underwriter will receive 155,896 shares for $517,258.80—$3.31 per share; and if stockholders subscribe for

(j) There was no assurance that the proposed new plan would be accepted by the necessary vote of the stockholders, or that it could be consummated if so approved;

(k) No fraud, mistake, gross inequity, or similar ground for vacating the previous orders of approval and confirmation was alleged, or proven; and

(l) A reopening of all proceedings on the plan in order to consider the proposed new plan would delay consummation of the reorganization proceedings for at least six months—more likely, at least a year—and saddle the debtor's estate with thousands of dollars of additional expense.

As opposed to the foregoing reasons for denying the petitions, petitioners advanced only one reason for granting them: In a highly speculative[9] "over the counter", "when issued", market, the proposed new shares were

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95% of the shares, the underwriter will receive 112,791 shares for $258,629.40—$2.28 per share. If stockholders subscribe for more than 95% of the shares, the price to the underwriter will be less than $2.28 per share.

Under the confirmed plan, the old debenture holders receive, for their claim of $5,942,500 (as of November 1, 1946), $2,852,400 of new convertible debentures (convertible into 16 shares per $100 during the first three years, and 10 shares per $100 for two years thereafter) and 475,400 shares of stock. They therefore receive 475,400 shares for the cancellation of $3,090,100 of their claims—equivalent to $6.50 per share—and conversion privileges at the rates of $6.25 and $10 per share.

[9] That there is a direct connection between the filing of these petitions and market speculations in the debtor's shares was revealed by the Securities and Exchange Commission at the hearing before the District Court (R. 71-73). Mr. Berner, attorney for one of the petitioners, *before* publicly announcing or filing his present attack on the confirmed plan, advised his brother-in-law to buy shares of the debtor. At the opening of the market on Wednesday, July 10, 1946, *before* Mr. Berner filed his petition, his brother-in-law purchased 20,000 shares of the debtor in the market. Later in the day, after Mr. Berner had filed his petition, the market advanced considerably. Mr. Berner has admitted these facts (R. 81).

selling on July 12, 1946 for $13 a share—about twice their sound economic value as fixed in the reorganization proceeding by the application of reorganization standards of valuation, based on prospective earnings. They argued that stockholders should be given an opportunity to realize this speculative market price.

The position of petitioners disregards the volatile and ephemeral nature of prices established in this manner, assumes that inflated and unjustified prices established in a thin market by the purchase and sale of a few shares will prevail when over 1,000,000 shares are issued and become the subject of trade, and assumes that the July 12, 1946 unnatural prices will still prevail after expiration of the time which must necessarily elapse before a new plan could be consummated.

The absolute unreliability of market prices (especially "when issued" prices) is clearly demonstrated by the fact that these shares recently have fallen, and are now close to the sound economic value which was fixed in the reorganization proceeding and which was used in the allotment of the new shares to creditors and stockholders under the confirmed plan; thus demonstrating again the wisdom of the rule that only sound economic values based on prospective profits are to be used to determine the rights of creditors and stockholders in reorganization. If the present market trend continues, these shares may soon be quoted in the "when issued" market at considerably less than their reorganization value, although there has been no change in the economic value of the debtor's office building (its sole asset, except cash) or in the debtor's prospective net earnings.

A reopening of the proceedings and a setting aside of the confirmed plan would also do grave and irreparable damage to many persons who purchased securities in reliance upon the order of confirmation. Some appeared at the hearing before the District Court to object to the

grant of the relief requested in the petitions (R. 75-79.) The District Judge referred to this in his Memorandum Opinion (R. 99).

A substitution of the proposed new plan for the confirmed plan would produce other results:

Most trustees of testamentary and *inter vivos* trusts have no power to retain shares of stock as trust investments. It is, therefore, common practice in reorganization situations, after the rights of holders of bonds have been fixed by an order of confirmation, for trustees to anticipate the future delivery of the new securities allotted to them under the plan and to sell immediately, on a "when issued" basis, the equity stocks which the law does not permit them to retain. Conservative investors also frequently do this. The extent to which this was done by holders of the debentures of this debtor is not known, but if the proposed modified plan should be adopted it is probable that many owners of debentures who sold their new common stock on a "when issued" basis will suffer loss by being compelled to cover in the open market.

Even if the proposed new plan had been fair and equitable and feasible—which it is not—and had been proposed early enough in the proceeding to warrant its consideration, the Court would have been under no obligation to approve it, rather than the confirmed plan, since the confirmed plan is concededly fair and equitable, and feasible. "The district court was not called on to say that the plan was the best or fairest that could be drafted." *In re Radio Keith Orpheum Corp.*, 106 F.(2d) 22, 26, (1939) *cert. den.* 308 U.S. 622; *In re Lower Broadway Properties*, 58 F. Supp. 615, 618 (S.D.N.Y. 1945).

None of the facts in the petitions were denied; there was therefore no necessity for taking further testimony. *Country Life Apts.* v. *Buckley, supra*, 145 F.(2d) 935, 937 (C.C.A. 2d, 1944).

Where in the light of the entire record it appears that the Court has given consideration to the issues involved and that the parties have been adequately represented, the action of the lower court will not be reviewed upon the ground of an alleged failure to exercise its discretion. See *Allen Calculators, Inc.* v. *Nat. Cash Register Co.*, 322 U.S. 137, 142 (1944).

POINT VI

The questions involved herein are not of such importance as to make it desirable that the writs be granted.

On the applications for writs to review the order of the Circuit Court of Appeals refusing a "stay", the ordinary jurisdiction of this Court is invoked. However, only a question of fact is involved: was the Circuit Court justified in refusing a stay under the circumstances of this case?

As to the applications for writs to review the orders of the *District Court,* reference is respectfully made to the discussion of the jurisdiction of this Court in bankruptcy proceedings hereinbefore set forth. (See "Jurisdictional Question Presented", *supra,* p. 3.)

Even if this Court has power, a direct review by it of judgments or orders of the District Court is only granted in exceptional cases where questions of public importance are involved or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. *Ex Parte United States,* 287 U.S. 241 (1932); *Ex Parte Republic of Peru,* 318 U.S. 578 (1943); see also 28 U.S.C. Sec. 345.

No constitutional question is here involved, as in *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 285 (1936); *Norman* v. *B. & O. R. R. Co.,* 294 U.S. 240, 249-5 (1935); *Railroad Re-*

tirement Board v. *Alton R. Co.*, 295 U.S. 330, 344 (1935). Nor is there any compelling reason shown why the usual procedure of appeal to, and determination by, the Circuit Court of Appeals is not wholly adequate and should not be followed.

There is no conflict among the decisions. The assertion in the Stockholders' Committee's brief (p.15) that *In Re 1934 Realty Co.*, 159 F.(2d) 477 (C.C.A. 2d, 1945), is in conflict with *Country Life Apts.* v. *Buckley, supra*, is unwarranted. The *Country Life* case holds that no *new plan* may be substituted for a confirmed or approved plan; the *1934 Realty* case approved a *modification* of a confirmed plan because the lower court had made a mistake of law in not subordinating one claim to the claims of other creditors.

POINT VII

Errors in Petitions.

In the petition in No. 609 (pp. 7, 8), it is stated that stockholders "might well realize through the sale of rights up to $50 for each share owned by them". This statement is clearly in error.

The most that is alleged by petitioners is that the new shares had a top value on July 12, 1946, of $13 per share. As each stockholder will have a right to get *one* new share for each old share upon payment of $6, the maximum value of the right would be $7 for each share and *not* $50 for each share owned by them.

In the petition in No. 610, a similar gross exaggeration occurs. It is stated (p. 7) that "for each increase of $1,000,000 in value of the real estate over that of $21,750,000 found by the Court, for the purpose of the plan, stockholders' rights under the City Investing offer would be

worth about $10 per stockholder's share". Under the proposed new plan, as well as under the confirmed plan, an issue of 1,017,993 shares of stock would be outstanding. Each $1,000,000 increase in value will therefore have a worth of *less* than $1 per stockholder's share instead of "$10 per stockholder's share".

It was statements similiar to the foregoing which led Mr. Justice Reed to assume in his opinion (R. 368): "If the stockholders' estimate of present value is correct, there is an advantage of some two to five dollars to each subscription warrant or from $20 to $50 per stockholder share under the new proposal".

As each stockholder is offered a warrant to purchase only one new share for each old share held, it is clear that the figures should be $2 to $5 per stockholder share instead of "$20 to $50 per stockholder share".

Mr. Justice Reed made his statement with a view to market conditions as of July 1946 when the "when issued" price was $13. It is very doubtful whether the rights would have any value under present market conditions.

POINT VIII

The so-called underwriting commitment has expired and has not been renewed.

The so-called commitment of the City Investing Company expired October 15, 1946. It has not been renewed.

Respondents contend that the commitment never had substance because the underwriter deliberately imposed conditions which it knew could not be met. The need for a binding commitment under which the underwriter could be held, regardless of changes in market conditions, has been demonstrated by recent events:

The stock market was at its high in July, when these applications were made. Speculation was rife. The new shares of the debtor, which had a concededly sound economic value of only approximately $6 per share, were priced at $13 a share in a thin and highly speculative "over-the-counter" market on a "when issued" basis. At that time, desiring to avail itself of this market, a real estate operator and speculator was willing to offer, for an exorbitant consideration, to purchase the shares for $6 a share. It refused, however, to bind itself for more than 90 days, and conditioned its obligation upon a termination of all legal proceedings, *including appeals*, and a delivery of the shares to it, before the expiration of the 90-day period. It knew the conditions could not be met within the time fixed. It was so informed by the Court, the Securities and Exchange Commission, and the interested parties. Nevertheless it refused to extend its offer for a longer period. (R. 66, 67.)

Now,—the period of the offer has expired, the speculative market of the shares has dropped, and the underwriter has refused to renew even its old offer with its impossible conditions.

All that remains is a hope on the part of the petitioners that they *may* be able to obtain a new commitment either from the City Investing Company or from some other source if the cases should be remanded to the District Court. They are in effect requesting the appellate courts to render a declaratory judgment on purely hypothetical questions. Such a request would not be appropriate even if made at an early stage of the proceedings, and certainly not after a plan has been confirmed and largely consummated. A purely hypothetical controversy certainly should not be entertained at this stage of the reorganization proceedings. The mere fact that a purported commitment, which in practical effect was illusory, existed

at one time in the past, does not give substance or vitality to the appeals.

We, therefore, pray that the several petitions for certiorari be dismissed, or if not dismissed, denied.

Respectfully submitted,

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Respondents.

New York, N. Y.
November 8, 1946.

APPENDIX

Sections of Bankruptcy Act

CHAPTER IV—COURTS AND PROCEDURE THEREIN

Sec. 24(c) *Jurisdiction of Appellate Courts.* The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals of the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

CHAPTER X, ARTICLE III—JURISDICTION AND POWERS OF COURT

Sec. 121. Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding.

CHAPTER X, ARTICLE IV—PETITION

Sec. 128. If no bankruptcy proceeding is pending, an original petition may be filed with the court in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction.

CHAPTER X, ARTICLE IX—CREDITORS AND STOCKHOLDERS

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing

of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

Sec. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

Sec. 224. Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

Sec. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

Sec. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

Sec. 227. The court may direct the debtor, its trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

Sec. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and lia-

bilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

CHAPTER X, ARTICLE XII—DISMISSALS AND ADJUDICATIONS

Sec. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

* * * * *

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

Federal Rules of Civil Procedure

Rule 60. Relief from Judgment or Order.

* * * * *

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just,

may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, §118, a judgment obtained against a defendant not actually personally notified.

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Supreme Court of the United States

October Term 1946

No. 609

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

No. 610

IN THE MATTER

of

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co., Inc."),

Debtor,

EQUITABLE OFFICE BUILDING 1913 CO., INC.,

Petitioner,

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

No. 612

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of the Equitable Office Building Corporation, Debtor,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF DEBENTURE HOLDERS' PROTECTIVE COMMITTEE IN OPPOSITION

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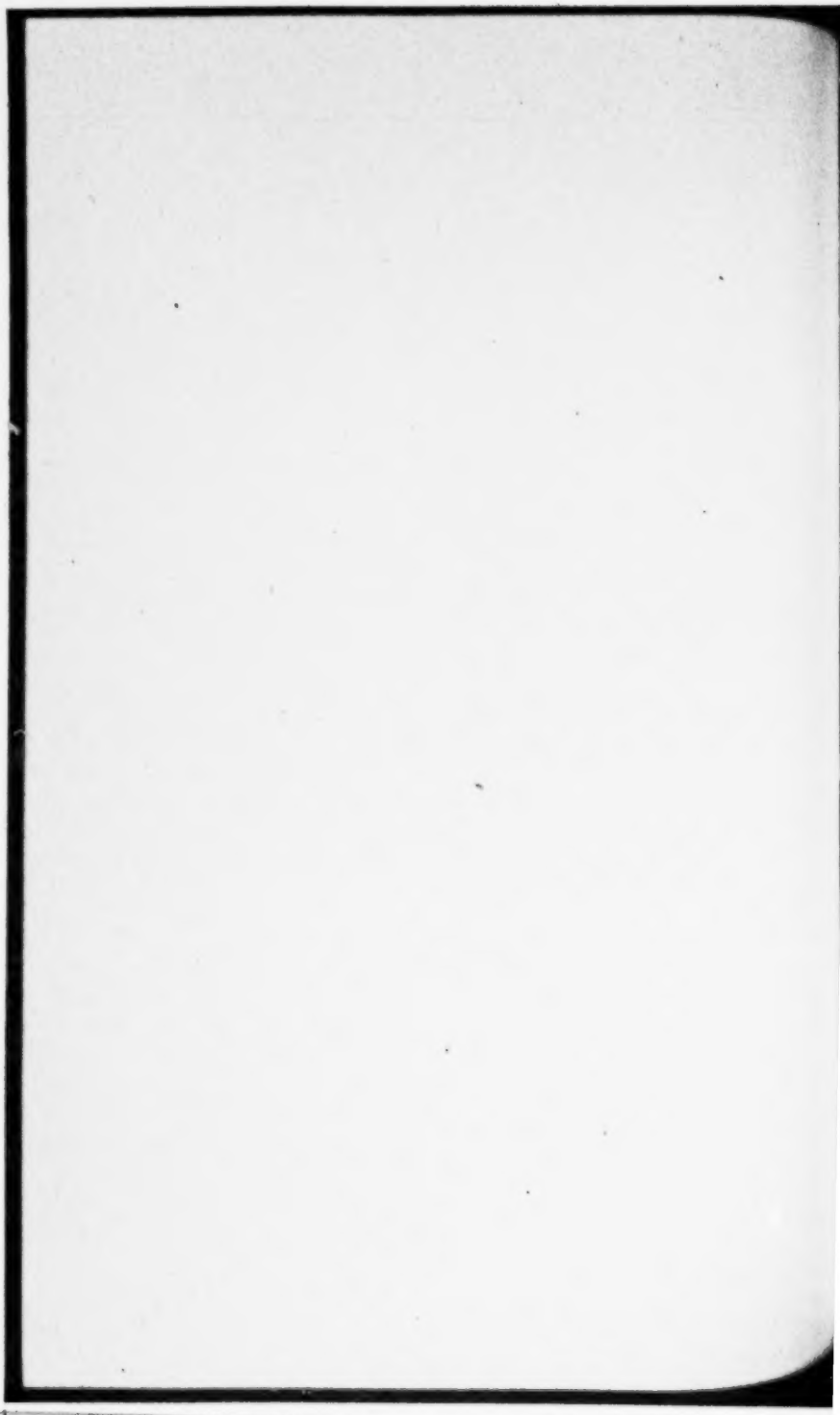
November 9, 1946



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Supreme Court of the United States

OCTOBER TERM 1946

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CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,
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J. DONALD DUNCAN, as Trustee, *et al.*,
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of
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Petitioner,
J. DONALD DUNCAN, as Trustee, *et al.*,
Respondents.

No. 612

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of the Equitable Office Building Corporation, Debtor,
Petitioners,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,
Respondents.

SUPPLEMENTAL BRIEF OF DEBENTURE HOLDERS' PROTECTIVE COMMITTEE IN OPPOSITION

Statement

There has been filed with this Court in opposition to the petitions for writs of certiorari a brief by all the debenture holders, including the undersigned, which contains a statement of all the pertinent factual data. We adopt the

complete factual statement and argument in said brief. This brief is limited to the sole proposition that the questions presented to this Court are purely hypothetical and that the petitions are utterly lacking in substance, in view of the absence of any underwriting commitment to support the proposed new plan.

ARGUMENT

Since there is now no semblance of a commitment to support the proposed new plan, the questions presented are hypothetical and the petitions are lacking in substance.

In essence, the petitions herein are based upon the refusal of the District Court to reopen the proceedings *de novo* and to consider a new plan, after the Trustee's Plan had been finally confirmed and was all but finally consummated and the time to appeal from such confirmation had expired.

The new plan offered by the petitioners in the District Court proposed to treat the security holders as follows: For each ten shares of old common stock there would be issued to the stockholders one new share. In order to raise funds to satisfy in full the claims of the debenture holders, it was proposed that (a) the stockholders be given the right for each share of existing stock to subscribe to one share of new stock at $6 per share (which would raise $5,172,488), and (b) the balance of about $770,000 required would be taken from the treasury. This offering of new stock to the stockholders at $6 per share would be underwritten by City Investing Company, which was to receive as a bonus 69,686 shares of new common stock.

This underwriting commitment, which was an integral and essential part of the petitioners' new plan, was subject to many conditions and was limited to a period of ninety days, which expired on October 15, 1946. The commitment

has not been extended, and at the present time there is not even a semblance of a commitment.

It would accordingly be academic to ask this Court to consider the petitions herein, which are based upon such expired commitment. Without the commitment, the petitioners have no new plan whatsoever to propose to the District Court. The questions on these petitions have accordingly become academic and hypothetical. The substance of the petitions and of the appeals has vanished.

In *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113 this Court stated (p. 116):

> "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' "

The authorities in this Court have uniformly recognized that an appeal should not be entertained where it presents no actual controversy involving real and substantial issues. Appellate courts should not be requested to render a declaratory judgment on purely hypothetical questions. This is especially true where the Court is being requested to render such a declaratory opinion in order to set aside a plan that has been confirmed and all but finally consummated. (See: *Mills* v. *Green*, 159 U. S. 651; *Security Life Ins. Co.* v. *Prewitt*, 200 U. S. 446; *Richardson* v. *McChesney*, 218 U. S. 487.)

CONCLUSION

The petitions for writs of certiorari should be denied and the stay vacated.

Respectfully submitted,

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Attorneys for Debenture Holders'
Protective Committee.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER OF EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building Co., Inc."), DEBTOR

No. 609

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD AND NEWCOMBE C. BAKER, AS A COMMON STOCKHOLDERS COMMITTEE, EQUITABLE OFFICE BUILDING CORPORATION, PETITIONERS

v.

J. DONALD DUNCAN, AS TRUSTEE, ET AL.

No. 610

EQUITABLE OFFICE BUILDING 1913 CO., INC., PETITIONER

v.

J. DONALD DUNCAN, AS TRUSTEE, ET AL.

No. 612

ADELAIDE H. KNIGHT AND WILLIAM P. DOYLE, COMMON STOCKHOLDERS OF THE EQUITABLE OFFICE BUILDING CORPORATION, DEBTOR, PETITIONERS

v.

J. DONALD DUNCAN, AS TRUSTEE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission became a party to the Chapter X reorganization

proceedings pursuant to Section 208 of the Bankruptcy Act, 11 U. S. C. § 608, and in the courts below supported the petition for a stay of proceedings pending hearings on the merits of the proposed modification of the plan of reorganization.

STATUTORY PROVISIONS

The pertinent sections of the Bankruptcy Act are set out in the Appendix, pp. 15–17.

STATEMENT

Reference is made to the briefs of petitioners for a fuller statement of the facts. For purposes of this memorandum we note only the following salient facts.

The confirmed Plan of reorganization for the debtor under Chapter X of the Bankruptcy Act deals principally with the interests of debenture holders and stockholders. The claims of debenture holders are satisfied in part by common stock of the reorganized debtor and in part by income bonds convertible into stock.[1] The existing stockholders receive one share of new common stock for each 10 shares now held, amounting to 8.4 to 15.4 percent of the new stock issue, depending upon whether or not the new income bonds should be converted. Subsequent to confirmation but prior to consummation of the

[1] The Plan left the first mortgage undisturbed and gave the second mortgage bondholders in the amount of $3,000 their principal in cash, without interest.

plan, stockholders Knight and Doyle (petitioners in No. 612), submitted to the district court a proposal from the City Investing Company to underwrite a modified plan which would afford the common stockholders an opportunity, through purchase of new stock, to pay off junior creditors their full principal and interest and thus retain for the existing stockholders the equity interests accorded to creditors by the confirmed Plan. This proposal was made possible by improved conditions since the date of confirmation. Stockholders not exercising their rights would receive the same stock interest as in the confirmed Plan; in addition, they would enjoy the privilege of selling their rights to subscribe. The underwriters' ability to perform was not questioned and was evidenced by tender of a certified check to the order of the trustee in the sum of $517,258.80, amounting to 10% of the possible maximum commitment.

Without receiving any testimony and without considering the merits (R. 116), the district court denied the petition and refused to stay consummation of the confirmed Plan. The Common Stockholders' Committee (petitioner in No. 609) and the Debtor (petitioners in No. 610) then sought to have the reorganization proceedings dismissed so that the Debtor, utilizing the offer of the City Investing Company, might exercise its equity of redemption in substantially the same manner as was suggested under the Knight Plan.

These petitions, too, were denied. Applications were then made to the Circuit Court of Appeals for the Second Circuit for an order staying the consummation of the Plan pending the outcome of the appeals on the merits; these applications were denied by a divided court.[2] Applications for a stay of proceedings were then filed with Mr. Justice Reed, who, on August 6, 1946, granted a stay pending decision by the full Court upon petitions for writs of certiorari (R. 360–369).

All of the petitioners have filed notices of appeal in the Circuit Court of Appeals for the Second Circuit from the judgments of the district court denying their requests for modification of the Plan or for dismissal of the reorganization proceedings. Only petitioners in No. 612, however, are presently going forward with the appeal in the court below. The Debtor and the Common Stockholders' Committee now seek a writ of certiorari to the Circuit Court of Appeals upon both the refusal to stay the proceedings and for the purpose of determining, prior to the judgment of the Circuit Court of Appeals, whether the action of the district court was proper. Petitioners in No. 612 seek certiorari solely upon the failure of the Circuit Court of Appeals to grant the stay pending appeal.

[2] The matter was first heard before Judges Learned Hand, Goddard and Coxe; only Judges Goddard and Coxe joined in the denial order (R. 392).

DISCUSSION

In our opinion the appeals to the Circuit Court of Appeals from the orders of the district court are meritorious and present questions of substantial importance in the administration of the Bankruptcy Act; and a stay is necessary to preserve the *status quo* pending disposition of these appeals on the merits by the Circuit Court of Appeals. This can be accomplished by this Court either by continuing the stay granted by Mr. Justice Reed or by remanding to the Circuit Court of Appeals with directions to enter a stay.

All of the petitioners rest their case on a financing proposal which for the first time would permit salvaging of the bulk of the equity while paying off all matured debts in full. Petitioners in No. 612, two stockholders, sought to alter the confirmed Plan of reorganization by substituting this proposal as a modified plan. The other petitioners asked for dismissal of the Chapter X proceedings following payment of all matured debts pursuant to the proposed financing. In our view compliance with the policy of the Act requires following the plan procedure prescribed by Chapter X, rather than dismissal. However, we agree with all of the petitioners that (1) the district court erred in ruling that the rights of the Debtor and the stockholders were cut off by the order of confirmation, and (2) the existing stay should be continued pending disposition on the merits.

Rapidly changing economic conditions in the post-war period dramatize the need for determination of the rights of security holders of debtors undergoing reorganization to take advantage of such changes. This Court has been confronted with different aspects of that problem in the railroad reorganization cases. See *Ecker* v. *Western Pacific R. R. Corp.*, 318 U. S. 448, 506–509; *R. F. C.* v. *Denver & R. G. W. R. Co.*, Nos. 278–282, October Term, 1945, decided June 10, 1946. We interpret this Court's opinions in those cases as presupposing the right of junior interests to profit by post-confirmation developments which make possible an improvement of their positions without limiting the strict priorities of senior creditors. The denial of a reexamination in those cases rested merely upon a holding that since the valuations under attack had been based upon a long-term forecast as to future earnings, they should not be reexamined merely because of a possibly ephemeral improvement in current earnings. In this case, however, the attempt before the district court to improve upon the confirmed plan and establish the existence of a salvagable equity was not an attempt to reopen an issue of valuation, but was backed by hard money and a responsible underwriting not previously available.

1. Since in our opinion the district court erred, a stay is necessary to avoid hardship to security holders and embarrassment to the reorganization

process. Consummation of the confirmed Plan would entail distribution of new stock to existing debenture holders and stockholders, possible exercise of conversion rights incident to the debentures, and public trading in the securities issued under the plan. Reversal of the orders of the district court and approval of a new plan might then require some of the securities issued under the Plan to be restored to the corporation. The mechanics of tracing the shares of common stock alone would present a monumental problem. In addition, the uncertainties of title would have serious effect upon the public security holders, who could not be sure of their status, and the chaos which reversal of the district court would create would be so great a court might well hesitate before rendering such a judgment. Thus, either the efforts of petitioner to secure relief from an erroneous determination would be prejudiced, or if relief were in fact obtained it would be upon conditions prejudicial to intervening rights.

2. We construe the orders of the district court denying the applications as resting upon a determination that once a plan has been confirmed the reorganization court should not consider a modification—whatever might prove to be its intrinsic merit—which may deprive any class of security holders of advantages conferred by the confirmed Plan. We understand the present posi-

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tion of debenture holders to be that the district court exercised its discretion and found a lack of merit in the proposed plan. However, the record, as we read it, shows the contrary. There was no attempt at weighing the advantages of the modified plan against the old. The district court memorandum opinion in No. 612 reads as follows:

> The deliberate and fully considered adjudication of a responsible court made and entered without objection on the part of any person in interest—and after all parties were afforded ample opportunity to be heard on the merits of the issues involved—and when they and the public—as they had a right to do—confidently relied upon its integrity, should be something more stable than a weather vane on a blustery day in March. For this reason, my consummation order of July 8, 1946, will stand. It follows that the application to reopen the reorganization proceedings of the debtor will be denied. (R. 99.)

When, at a hearing following the filing of the memorandum, an attorney for the bondholders sought to secure a declaration from the bench that the judgment had been rendered on the merits, the district judge replied:

> I simply denied the application. As I said the other day, there manifestly could not be a determination on the merits because I would have to have hearings and

> give notice to all stockholders and all persons in interest, to afford them an opportunity to be heard before I passed on the merits. (R. 116.)

That the district court misconceived the effect of an order of confirmation in barring a new or modified plan is further shown by the court's statement that "It is a question of time" and also by the reference as an analogy to the rule governing redemptions after a judicial sale (R. 138).[3]

We regard as applicable in the context of Chapter X the basic principle of equity which permits a debtor to redeem his property upon full discharge of creditors' claims. This is because the bankruptcy courts are courts of equity without terms, making the entire process of reorganization open to reexamination at any time until the close of proceedings. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152.

Section 222 of the Act (11 U. S. C. 622) is a clear statement of the right to modify or alter a plan "after confirmation" and contains a detailed description of the procedure to accomplish any modification sufficiently material to affect adverse-

[3] This statement of the rule, as we understand it, appears to be incorrect in failing to recognize that there is a right of redemption after sale, but not after confirmation of sale, which in the present context would be after consummation of the confirmed Plan.

ly the rights of creditors or stockholders.[4] Thus confirmation does not cut off rights.[5] It is merely a step in the reorganization process. *Wright* v. *The City National Bank & Trust Company,* 104 F. 2d 285, 287 (C. C. A. 6). Section 226 (11 U. S. C. 626) provides that upon consummation the property shall be "free and clear of all claims and interests of the debtor, creditors, and stockholders." This is inconsistent with an intention to consider the order of confirmation as the act which gives rise to a vested interest in the new securities provided by a plan. Section 236 (11 U. S. C. 636) expressly recognizes that confirmation does not necessarily imply that the confirmed plan will be put into effect as of course. It provides that "if a confirmed plan is not consummated" the court may dismiss the proceedings.

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[4] Our support of petitioners in No. 612 and our difference with petitioners in cases Nos. 609 and 610 rests on our belief that the statutory safeguards should be adhered to in connection with a consideration of the merits of the new proposals as they affect the interests of stockholders.

[5] We believe it is the consummation of the plan which withdraws "the protecting hand of the bankruptcy court" (*Bell* v. *Roberts*, 112 F. 2d 585, 586 (C. C. A. 3)) and vests in each security holder the new rights. See *In re Ambassador Hotel Corp.*, 124 F. 2d 435 (C. C. A. 2); *Bakers Share Corp.* v. *London Terrace, Inc.*, 130 F. 2d 157, 159 (C. C. A. 2). Prior to that time the property of the debtor is in *custodia legis*, subject to the control of the court so that it may supervise the accomplishment of the "fair and equitable" principles established by the Bankruptcy Act.

The debenture holders rely on Section 224 (11 U. S. C. 624) which speaks of provisions of the plan which are "binding * * * upon all creditors and stockholders," but this section must be read with the provisions of Section 222. Under Section 222 there may be more than one confirmation order if the court finds it necessary to alter the Plan in a material respect after one such order has been entered. Section 224 refers to the last confirmation order entered, for that is the one which will regulate the rights of the security holders.[6] See *In re 1934 Realty Corporation,* 150 F. 2d 477 (C. C. A. 2), certiorari denied, 326 U. S. 734, holding that a district court should entertain a post-confirmation amendment necessary to

[6] *Country Life Apartments* v. *Buckley*, 145 F. 2d 935 (C. C. A. 2) and *In re Diversey Bldg. Corp.*, 141 F. 2d 65 (C. C. A. 7), cited by respondents in support of their position, are not inconsistent with our view. In the *Country Life* case the court found that the new plan was neither fair nor feasible nor equitable, and it was apparent that no new factor had arisen after the order of approval which might justify full consideration of a new and different plan. The decision, therefore, apart from the finding of lack of fairness in the new plan, was that the court need not consider it at that particular stage in the proceedings in the absence of any new developments justifying such action. *In re Diversey Bldg. Corp.*, 141 F. 2d 65 (C. C. A. 7) supports our view that it is the consummation of a plan which fixes the rights of security holders, for the debtor in the reorganization proceedings involved in that case sought to amend and modify the plan after the plan had been consummated, eight years after the order of confirmation.

correct inequity revealed by supervening decisions of the New York Court of Appeals and of this Court, although the time to appeal from the order of confirmation had elapsed.

3. The proposed plan shows on its face that in contrast to the confirmed plan it provides for saving of the equity as well as payment in full of the debentures with enough left over for adequate working capital. The offer by the City Investing Company is dramatic evidence of the ability of the enterprise to provide for the retirement of the creditor claims affected by the confirmed Plan.[7] In failing to take testimony and consider the merits of this plan the district court prevented the stockholders from realizing what appeared to be an equity in the debtor's property and allowed that equity to inure to the debenture holders instead.

Although the commitment of City Investing Company, given to the district court on July 16, expired by its terms on October 15, 1946, there is reason to believe that meritorious proposals of the same general character will be available for

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[7] The Commission regards any discussion of the present value of the debtor's property as irrelevant. Because of the nature of the proposed modification, the pertinent inquiry is whether the district court was warranted in rejecting, without hearing on the merits, an underwriter's proposal which on its face offered the prospect of fully satisfying creditors' claims and preserving for stockholders a larger equity than the confirmed Plan.

consideration on the merits by the district court. Uncertainties inherent in the situation result from the ruling of the district court and the litigation which has followed. Accordingly, we regard this new development as not rendering moot the controversy as to whether the district court has a duty to entertain a meritorious proposal of the same general purport as the one submitted by petitioners.[8]

In urging that this Court limit its review for present purposes to the question of the stay of consummation (in substance the course urged by the petitioners in case No. 612), we do not wish to belittle the importance of the issue which would be presented if the decision of the district court were affirmed on its merits by the Circuit Court of Appeals. However, we do not regard the denial of the stay as necessarily forecasting such a decision by the Circuit Court of Appeals on the merits and, in the event of reversal by the Circuit Court of Appeals, further review by this Court might well be unnecessary. At this juncture we urge only the importance of preserving the status quo pending determination of the appeals to the Circuit Court of Appeals and to this end request that the Court continue the stay either directly or by way of

[8] On November 11, 1946, the Circuit Court of Appeals denied in open court a motion to dismiss the appeals in that court as moot because of the expiration of the commitment.

instructions to the Circuit Court of Appeals to enter an appropriate stay.*

Respectfully submitted,

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Securities and Exchange Commission.

NOVEMBER 1946.

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* All parties emphasize the importance of the time element, petitioners in Nos. 609 and 610 seeking to shorten the process by urging direct review by this Court. Meanwhile the appeal by petitioners in 612 was argued on November 11, 1946. However, this does not eliminate the necessity of this Court's acting upon the petitions, in view of the suggestion by petitioners in Nos. 609 and 610 that the Circuit Court of Appeals delay decision until this Court has acted upon their petitions for direct review of the district court rulings.

APPENDIX

The pertinent sections of the Bankruptcy Act are as follows:

SEC. 222 (11 U. S. C. 622). A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

* * * * *

SEC. 224 (11 U. S. C. 624). Upon confirmation of a plan—

(1) The plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it

or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

* * * * *

SEC. 226 (11 U. S. C. 626). The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession,

as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

* * * * *

SEC. 236 (11 U. S. C. 636). If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

[ ] GOVERNMENT PRINTING OFFICE: 1946